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## Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act

George Cameron Coggins

John W. Head

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# BEYOND *DEFENDERS*\*: FUTURE PROBLEMS OF EXTRATERRITORIALITY AND SUPERTERRITORIALITY FOR THE ENDANGERED SPECIES ACT

GEORGE CAMERON COGGINS\*\*

JOHN W. HEAD\*\*\*

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## I. INTRODUCTION

### A. *The Context*

The world has become increasingly interdependent, and many environmental concerns now transcend national boundaries. International cooperation in recent years has resulted in agreements or proposals concerning such international subjects as marine fishery resources,<sup>1</sup> whale preservation,<sup>2</sup> acid rain abatement,<sup>3</sup> global warming prevention,<sup>4</sup>

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\* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

\*\* Tyler Professor of Law, University of Kansas. A.B. 1963, Central Michigan University; J.D. 1966, University of Michigan.

\*\*\* Associate Professor of Law, University of Kansas. B.A. 1975, University of Missouri; B.A. (Jurisprudence) 1977, Oxford University; J.D. 1979, University of Virginia. The authors thank Kara Pate and Scott Bergstrom, law students at the University of Kansas, for their research assistance.

1. See, e.g., United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982).

2. See, e.g., International Convention for the Regulation of Whaling, *done* Dec. 2, 1946, 62 Stat. (2) 1716, 161 U.N.T.S. 72 (*entered into force* Nov. 10, 1948).

3. See, e.g., Erik K. Moller, *The United States-Canadian Acid Rain Crisis: Proposal for an International Agreement*, 36 UCLA L. REV. 1207 (1989).

ozone layer protection,<sup>5</sup> Antarctic resource preservation,<sup>6</sup> and regulation of international waterway pollution.<sup>7</sup> More such proposals are likely in the wake of the Rio Conference.<sup>8</sup> Most of these initiatives are bilateral or multilateral: two or more countries mutually agree to take steps within their boundaries to solve perceived problems of potential international scope.

The United States has developed what is probably the most advanced legal system for environmental protection in the world. Most American environmental law operates only domestically. In several instances, however, federal statutes apply beyond national boundaries. Many of these statutes concern relations defined by bilateral or multilateral treaty. Thus, for instance, the number of seals harvested in the Pribilof Islands,<sup>9</sup> the seasons for migratory bird hunting,<sup>10</sup> whaling restrictions,<sup>11</sup> trade in endangered species,<sup>12</sup> and a wide variety of similar regulations are governed both by treaties and by domestic law implementing those treaties.<sup>13</sup>

Occasionally, Congress has acted unilaterally in ways that affect the domestic policies of other countries vis-a-vis the environment. This is

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4. See, e.g., Lakshman D. Guruswamy, *Global Warming: Integrating United States and International Law*, 32 ARIZ. L. REV. 222 (1990).

5. See, e.g., Montreal Protocol on Substances That Deplete the Ozone Layer, *done* Sept. 16, 1987, 26 I.L.M. 1550 (*entered into force* Jan. 1, 1989).

6. See, e.g., Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources, U.N. Doc. UNEP/WG. 120/30 (1985); Brian Robert Murphy, Note, *Antarctic Treaty System — Does the Minerals Regime Signal the Beginning of the End?*, 14 SUFFOLK TRANSNAT'L L. J. 523 (1991).

7. See, e.g., Robert D. Hayton & Albert E. Utton, *Transboundary Groundwater: The Bellagio Draft Treaty*, 6 TRANSBOUNDARY RESOURCES REP. No. 2 at 1 (1992).

8. See, e.g., Paul Lewis, *New Environmental Debate Expected as U.N. Convenes*, N.Y. TIMES, Sept. 16, 1992, at A10.

9. Fur Seal Act of 1966, 16 U.S.C. §§ 1151-1187 (1988). See *International Fund v. Baldrige*, 594 F. Supp. 129 (D.D.C. 1984) (applying the Act to proposed seal killing).

10. Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711 (1988). See George C. Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1979) for an historical analysis of the Migratory Bird Treaty Act.

11. See International Convention for the Regulation of Whaling, *supra* note 2.

12. 16 U.S.C. § 1538(c) (1988) (prohibiting trade or possession of endangered species). This section implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *done* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (*entered into force* July 1, 1975).

13. See generally MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 252-78 (2d ed. 1983) (discussing the international aspects of federal wildlife law).

often accomplished through some form of trade restriction. For example, the United States forbids the import of marine mammal products if the animals are taken in a manner contrary to American law.<sup>14</sup> Similar restrictions apply to the importation of foreign tuna,<sup>15</sup> and Congress has legislated directly against continuance of whaling by Japan.<sup>16</sup> Products from species declared by the United States to be threatened or endangered cannot be imported into this country even if the exporting nation does not protect the species.<sup>17</sup> In these instances, the United States uses its enormous market power to coerce other countries into adopting what Congress considers to be better environmental practices. The executive branch, leery of foreign reactions, often has tried to water down the consequences called for in the legislation, sometimes successfully.<sup>18</sup> In addition, authorities of the international General Agreement on Tariffs and Trade currently are challenging the United States' ban on importation of tuna.<sup>19</sup>

Another form of unilateral action exercised by Congress in recent years seeks even more influence over the environmental policies of other countries. International institutions often finance economic development projects in less developed countries. Many countries and organizations have noted with dismay the potential consequences of some such development projects: desertification, tropical deforestation, pollution, erosion, and loss of wildlife resources.<sup>20</sup> Congress in

14. 16 U.S.C. §§ 1372(b), (c) (1988). See *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977) (granting standing to environmental groups challenging the government's decision to allow the importation of baby sealskin furs into the United States).

15. 16 U.S.C. § 1372(c)(3) (1988).

16. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (holding that the Secretary of Commerce is required to report Japan's failure to abide by the whaling quotas because it diminished the effectiveness of the regulation of whaling).

17. 16 U.S.C. § 1538 (1988).

18. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. at 223 (holding that the Executive branch retains a significant amount of discretion in determining violations of Whaling Regulations); *Animal Welfare Inst. v. Kreps*, 561 F.2d at 1013 (Executive branch unsuccessfully attempted to waive statutory requirements of the Marine Mammal Protection Act).

19. See, e.g., Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. 10268 (1992); Hilary S. French, *The Tuna Test: GATT and the Environment*, 6 TRANS-BOUNDARY RESOURCES REP. No. 2 at 6 (1992).

20. E.g., *Goals and Principles of Environmental Impact Assessment*, U.N. Doc. UNEP GC. 14/17 Annex III (1987); N. MYERS, *THE PRIMARY SOURCE: TROPICAL*

several instances has instructed United States government officials serving as executives in the World Bank and regional development banks to oppose development projects unless an environmental evaluation of the project (the functional equivalent of an environmental impact statement) has first been prepared and submitted for review.<sup>21</sup>

### B. *The Question*

Recently, environmental organizations tried, unsuccessfully, to litigate the question whether Congress intended the procedural and substantive structures of the Endangered Species Act (ESA)<sup>22</sup> to apply extraterritorially. This article focuses on that question and the consequences of an affirmative answer.

The ESA arguably is the strictest and most far-reaching wildlife preservation law ever enacted by any jurisdiction.<sup>23</sup> After a species of animal<sup>24</sup> has been officially listed as endangered or threatened,<sup>25</sup> the Act imposes a variety of protective requirements. International and domestic commerce in the species is forbidden;<sup>26</sup> no one can "take" a listed species in the United States or on the high seas;<sup>27</sup> critical habitat is to be designated;<sup>28</sup> and the United States Fish and Wildlife Service

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FORESTS AND OUR FUTURE (1984); LYNTON K. CARDWELL, INTERNATIONAL ENVIRONMENTAL POLICY (1984).

21. See *infra* notes 125-37 and accompanying text discussing environmental conditionality.

22. 16 U.S.C. §§ 1531-44 (1988).

23. See generally George C. Coggins & Irma S. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L. J. 1433 (1982).

24. Plant species are also eligible for listing and protection, but the Act treats them differently from fauna. See George C. Coggins & Anne F. Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCE J. 247, 278-304 (1987) (evaluating ESA's coverage and implementation in the context of plant preservation).

25. The term "endangered species" is defined as any species in danger of extinction throughout most of its range. 16 U.S.C. § 1532(6) (1988). A "threatened species" is any species that is likely to become an endangered species in the foreseeable future. *Id.* § 1532(20). See also *id.* § 1533 (express language defining an endangered or threatened species).

26. 16 U.S.C. § 1538(a)(1) (1988).

27. *Id.* § 1538(a)(1)(A), (B). According to the ESA, "take" means to kill, capture, pursue, hunt, shoot, or trap. An "attempt" to engage in any such conduct also falls within the scope of the Act. *Id.* § 1532(19).

28. 16 U.S.C. § 1533(a)(3), (b)(2).

(FWS) is to prepare a recovery plan.<sup>29</sup> Apparently, all concerned agree that these strictures do not apply on foreign soil.

There is no such agreement, however, with respect to Section 7 of the ESA. That section requires all federal agencies to conserve listed species and to insure that their administrative actions neither jeopardize such species nor degrade their critical habitats.<sup>30</sup> To achieve those ends, the Act sets up a complex, detailed scheme whereby the action agency must consult with the FWS.<sup>31</sup> The FWS performs biological studies and issues an opinion. If the FWS concludes that the action and the welfare of the species would irreconcilably conflict, even after mitigation measures are instituted, the action cannot go forward. A last resort, seldom used, is clearance by a cabinet level committee known as the "God Squad."<sup>32</sup>

Section 7 is not, on its face, limited to domestic application. Instead, it purports to bind every federal agency in all circumstances without reference to geography.<sup>33</sup> By way of regulations issued in 1978, the Carter Administration took the view that the Section 7 consultation requirements applied to federal agencies that take actions abroad.<sup>34</sup> In 1986, however, the Reagan Administration repealed that part of the regulations.<sup>35</sup> Several environmental groups challenged the legality of

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29. *Id.* § 1533(f). A recovery plan that promotes the survival of endangered species must describe (1) a site-specific management action; (2) objective, measurable criteria to remove certain species from the protected list; and (3) an estimate of the time and cost to carry out the necessary measures. *Id.* § 1533(f)(1)(B).

30. Section 7 of ESA is codified at 16 U.S.C. § 1536(a) (1988). See Coggins & Russell, *supra* note 23, at 1461-69 (discussing the duties established by Section 7).

31. 16 U.S.C. § 1536(a).

32. The "God Squad" is also known as the Endangered Species Committee. The Act created this Committee to expedite and improve the consultation process of ESA. The Committee is composed of seven members: (a) the Secretary of Agriculture; (b) the Secretary of the Army; (c) the Chairman of the Council of Economic Advisors; (d) the Administrator of the Environmental Protection Agency; (e) the Secretary of Interior; (f) the Administrator of the National Oceanic and Atmospheric Administration; and (g) the President of the United States. 16 U.S.C. § 1536(e) (1988). See Coggins & Russell, *supra* note 23, at 1487-95 for a discussion of the Committee's functions and activities.

33. The statutory language of § 1536(a)(2) states that each federal agency shall insure that "any action authorized, funded or carried out by the agency . . . [may] not jeopardize the continued existence of any endangered species" (emphasis added). Thus, the scope of this regulation is not limited to the United States.

34. Interagency Cooperation — Endangered Species Act of 1973, 43 Fed. Reg. 874 (1978) (codified at 50 C.F.R. § 402.01 (1985)).

35. Interagency Cooperation — Endangered Species Act of 1973, as amended, 51 Fed. Reg. 19,926 (1986) (codified at 50 C.F.R. § 402.01 (1991)).

that repeal in a lawsuit that reached the United States Supreme Court in 1992, *Lujan v. Defenders of Wildlife*.<sup>36</sup> The Court ruled that plaintiffs lacked standing to bring the suit, thus avoiding the substantive question of extraterritoriality.<sup>37</sup>

Eventually, either Congress or the courts must resolve that question. The United States government conducts many kinds of activities abroad that have direct and indirect consequences for environmental quality generally and wildlife welfare specifically. For instance, one focal point of the *Defenders* litigation was participation by the United States Agency for International Development (USAID) in the Mahaweli development project in Sri Lanka.<sup>38</sup> That project encompassed the construction of dams, waterways, lakes, reservoirs, and irrigation systems.<sup>39</sup> These structural changes essentially remolded south central Sri Lanka. Environmentalists claimed that the project would irreparably harm wildlife, including several endangered species.<sup>40</sup> The Mahaweli project is only one example of USAID's involvement in operations outside the United States.<sup>41</sup> Similarly, many other federal agencies have missions that include international assistance and consultation on development projects abroad.<sup>42</sup>

The next section of this article describes the *Defenders* litigation and the Court's procedural ruling. The third section analyzes the unresolved substantive question and concludes that, more likely than not, Congress did not intend extraterritorial application of Section 7. Congress of course has the power to order agencies to follow American legal guidelines even when operating abroad. If a court finds that the ESA, as now constituted or as subsequently amended, does have extraterritorial application, a new series of questions will arise. Section IV of this article addresses some of those questions, emphasizing "superterritoriality" as well as extraterritoriality, in the context of de-

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36. 112 S. Ct. 2130 (1992).

37. *Id.* at 2146. See *infra* notes 43-79 and accompanying text.

38. *Defenders*, 112 S. Ct. at 2138.

39. See Julian Weiss, *Sri Lanka's Economy Starts to Snap Back*, THE CHRISTIAN SCIENCE MONITOR, Mar. 30, 1989, at 9, col. 1.

40. *Defenders*, 112 S. Ct. at 2138.

41. See *infra* note 104 and accompanying text for a description of USAID's financial assistance programs.

42. Agencies within the State, Interior, Treasury, Agriculture, and Commerce Departments, *inter alia*, have some foreign responsibilities.

velopment assistance projects of the type referred to in the *Defenders* litigation.

## II. THE ESA AND THE *DEFENDERS* CASE

In enacting the Endangered Species Act, Congress unquestionably was motivated, at least in part, by a desire to conserve all species worldwide, not just in the United States. To that end, the ESA (1) empowers the Secretary of the Interior to designate as endangered or threatened any wildlife species in the world,<sup>43</sup> (2) instructs the government to cooperate with other countries,<sup>44</sup> and (3) provides that products from listed species cannot be imported into this country.<sup>45</sup> Roughly half of the ESA's provisions refer to international considerations. Congress did not make it a crime, however, for an American to "take" a listed species on the land or in the territorial sea of another country.<sup>46</sup>

*Defenders* involved the question whether ESA Section 7 applies (and if so, how) to federal agencies operating in foreign countries. Section 7 imposes three related but distinct duties on all federal agencies. Such agencies must (1) affirmatively "conserve" listed species,<sup>47</sup> (2) "insure that any action authorized, funded, or carried out" by them is not likely to "jeopardize" a listed species,<sup>48</sup> and (3) likewise insure that such action is not likely to destroy a listed species' designated "critical habitat."<sup>49</sup> Although the relevant provision is silent on whether the Secretary of the Interior has a duty to designate critical habitat for species in other countries, the Interior Secretary has argued that he does not have any such duty, and that position has not been challenged.<sup>50</sup>

Plaintiffs in *Defenders* alleged that federal agencies funding or assist-

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43. 16 U.S.C. § 1533(b) (1988).

44. *Id.* § 1537.

45. *Id.* §§ 1538(a), (c), (d).

46. *Id.* § 1538(a)(1). *Cf.* *United States v. Mitchell*, 533 F.2d 996, 997 (5th Cir. 1977) (holding that the criminal prohibitions of the Marine Mammal Protection Act of 1972 do not "reach conduct in the territorial waters of a foreign sovereignty").

47. 16 U.S.C. § 1536(a)(1) (1988). See 2 GEORGE C. COGGINS, *PUBLIC NATURAL RESOURCES LAW* § 15.05[2][d] (1992) for a discussion of the ESA's affirmative conservation duty.

48. 16 U.S.C. § 1536(a)(2) (1988).

49. *Id.*

50. *Defenders*, 112 S. Ct. at 2150 (Stevens, J., concurring).



ing with projects in other countries were bound to follow the ESA Section 7 consultation procedures if the projects threatened to harm listed species. The Secretary of the Interior had so construed the statute in 1978,<sup>51</sup> but the State Department did not concede the accuracy of that interpretation,<sup>52</sup> and in 1986, the Interior Department rewrote the regulation to delete the reference to foreign operations.<sup>53</sup> The major questions presented in *Defenders* were whether the plaintiffs had standing to sue, and, if so, whether the statute required foreign application.

Before 1990, standing law in general was confused at best, but standing to sue in domestic natural resource law cases was seldom a problem.<sup>54</sup> In *Sierra Club v. Morton*,<sup>55</sup> a 1972 decision concerning a national forest ski development, the Supreme Court held that public interest organizations have standing to challenge governmental actions if their members "use" the area to be affected and the development or action would offend their aesthetic sensibilities.<sup>56</sup> Subsequent Supreme Court opinions found standing even when the harm to plaintiff was extremely attenuated or remote<sup>57</sup> — evidently because the Court desired to answer the substantive questions presented by those cases.<sup>58</sup> The established conservation organizations such as the Sierra Club, the

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51. See *supra* note 34 and accompanying text.

52. *Defenders*, 112 S. Ct. at 2140-42.

53. See *supra* note 35 and accompanying text.

54. See Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10557, 10558 (1990) for an historical analysis of environmental standing cases.

55. 405 U.S. 727 (1972).

56. *Id.* at 735.

57. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (granting standing to wildlife conservation groups seeking to compel the Secretary of Commerce to certify that Japan's fishing operations diminished the effectiveness of the International Convention for the Regulation of Whaling); *Bryan v. Yellen*, 447 U.S. 352, 367-68 (1980) (granting standing to person who had sufficient interest in the controversy because application of a federal reclamation law would make it likely that excess lands would become available at less than market prices); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73 (1978) (holding that appellees had standing to challenge the constitutionality of legislation allowing for the construction of nuclear power plants; appellees claimed they were harmed by the power plants which were in potentially dangerous proximity to their living and working environment); *United States v. SCRAP*, 412 U.S. 669, 685 (1973) (granting standing to unincorporated association whose members claimed that increased rates for railroad freight would cause direct economic harm, as well as harm to their aesthetic and environmental well-being).

58. In each of the cases cited in the preceding note, and not at all coincidentally, the Court found against plaintiff on the merits.

National Resources Defense Council, the Audubon Society, and the National Wildlife Federation were routinely granted standing by nearly all courts in nearly all situations.<sup>59</sup>

The 1990 *Lujan v. National Wildlife Federation*<sup>60</sup> decision marked an abrupt change of uncertain magnitude. In a five to four decision, the Court dismissed a suit on standing grounds because the plaintiff's initial affidavits were deemed insufficient<sup>61</sup> — even though all concerned were aware that plaintiff, the nation's largest conservation organization, in fact met every standing test hitherto devised.<sup>62</sup> The Court did not purport to change the test for standing, however, and its confusing opinion raised far more questions than it answered.<sup>63</sup> *Defenders* continues that trend.

To demonstrate standing, plaintiff must show injury in fact, causation, and redressability. In *Defenders*, two members of plaintiff organization swore that each had visited a foreign site where United States-assisted projects threatened listed species, that each intended to return to the site, and that the extinction of the species there caused by the projects would harm their personal and professional interests in wildlife. The district court originally dismissed the suit for lack of standing, but the Eighth Circuit reversed that ruling and later affirmed the determination that the defendants had violated the ESA.<sup>64</sup> The case had bounced around the Eighth Circuit for nearly six years by the time the Supreme Court remanded it in June 1992 for "proceedings consistent with this opinion."<sup>65</sup>

The case generated four opinions from the Supreme Court. Justice Scalia wrote the plurality opinion, joined by Chief Justice Rehnquist and Justices White and Thomas. The main thrusts of Scalia's analysis were that plaintiffs had demonstrated neither injury in fact nor redressability and consequently lacked standing.<sup>66</sup> In a concurring opinion

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59. Cf. 1 COGGINS, *supra* note 47, at § 6.05[2][a].

60. 110 S. Ct. 3177, 3189 (1990).

61. *Id.* at 3187-88.

62. See 1 COGGINS, *supra* note 47, at § 6.05[2][a].

63. *Id.*

64. The *Defenders* litigation at the trial level and in the Eighth Circuit is reported at 658 F. Supp. 43 (D. Minn. 1987); 851 F.2d 1035 (8th Cir. 1988); 707 F. Supp. 1082 (D. Minn. 1989); 911 F.2d 117 (1990). In the first three of these cases, the defendant was then-Secretary of the Interior Donald P. Hodel.

65. *Defenders*, 112 S. Ct. at 2146.

66. *Id.* at 2137-42.

written by Justice Kennedy, he and Justice Souter agreed that the necessary injury was lacking, but they declined to address redressability and cautioned that the Court must be "sensitive" to new rights and forms of action.<sup>67</sup> Justice Stevens also concurred in the result, but for different reasons: he opined that plaintiffs had standing but that their substantive claim was ill-founded.<sup>68</sup> Justices Blackmun and O'Connor dissented on the standing issue.<sup>69</sup>

The Court's recent approach to standing questions in natural resources law has been highly fact-specific and technical. The Court has not directly overturned the 1970s precedents which made standing for environmental organizations relatively easy to prove. However, the Court's new emphases, and the lurking hostility of Justice Scalia to all "public interest" litigation,<sup>70</sup> suggest that courts will cut back, more or less drastically, on that easy availability. As matters stand now, however, a plaintiff could gain standing to challenge the rule at issue if he or she had airplane tickets to return to the foreign wildlife site in danger.<sup>71</sup> That may sound silly, but Justice Kennedy confirmed that just such a technicality was the hinge on which the decision swung.<sup>72</sup>

Cynical observers may conclude that the Court's standing opinions are post hoc exercises in avoiding questions the Court prefers not to decide. The Court itself often notes the asymmetry and inconsistency of its semantic tests and results.<sup>73</sup> The two recent *Lujan* and *Defenders* decisions, however, evidence a deeper commitment to narrowing the ability of courts to oversee administrative actions. Justice Scalia has stated that courts should strive to elevate the power of the executive over that of Congress,<sup>74</sup> and that standing, as a function of separation of powers, is an appropriate vehicle of interpretation to serve that

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67. *Id.* at 2146-47 (Kennedy, J., concurring).

68. *Id.* at 2147-51 (Stevens, J., concurring).

69. *Id.* at 2151-60 (Blackmun, J., dissenting).

70. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 891 (1983) (arguing that plaintiff organizations such as the NAACP or American Civil Liberties Union rarely proffer a concrete injury in fact; and that the doctrine of standing should exclude this type of litigation altogether).

71. *Defenders*, 112 S. Ct. at 2138.

72. *Id.* at 2146 (Kennedy, J., concurring).

73. *E.g.*, *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

74. Scalia, *supra* note 70, at 883-84.

end.<sup>75</sup> Most Justices have not concurred with Scalia's more radical propositions, but his suggestive language<sup>76</sup> was joined by several other Justices in *Defenders*.

Public interest lawsuits will be more complex and difficult for many plaintiffs in the foreseeable future. Standing (and ripeness) challenges will encumber all stages of the litigation. Administrative law might well come to resemble civil procedure in the 1820s, with all parties concerned more about the pleadings and motions than the real substantive issues. Metaphysical pronouncements often have that effect.

The *Defenders* Court did not decide whether the ESA's Section 7 applies extraterritorially, although Justice Stevens concluded that it did not. It thus remains open to a person who can demonstrate actual — if only aesthetic — harm in a concrete situation to litigate the question again. Evidently, wildlife professionals (biologists, managers, nature writers, etc.) will have standing if they are familiar with a species in the affected area and have firm plans to revisit the area. Perhaps foreign nationals living in the affected area also would have standing. Such a future litigant might, however, face a "Catch 22": even though a case is unripe or unredressable until such time as a concrete application of the new policy is actually made by the federal agency,<sup>77</sup> a court may hold that the litigant nevertheless is barred by the general six year statute of limitations<sup>78</sup> for such federal claims,<sup>79</sup> at least if it is the 1986 regulation that is the object of the challenge.

The remainder of this article examines the substantive question of the ESA's applicability to operations on foreign soil. Section III concludes that a court addressing this substantive question in the future will likely agree with Justice Stevens that Congress did not intend to extend ESA Section 7 to such operations. Section IV then looks beyond that issue to another: if in the future Congress wishes to give

75. *Id.* See also Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 107 (1987).

76. *Defenders*, 112 S. Ct. at 2136: "Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understandings of what activities are appropriate to legislatures, to executives, and to courts . . . . One of those landmarks . . . is the doctrine of standing." *Id.* (citation omitted).

77. *Lujan v. NWF*, 110 S. Ct. 3177, 3189 (1990).

78. 28 U.S.C. § 2401(a) (1988).

79. *Cf. Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362 (9th Cir. 1990) (holding that standing to sue is not a prerequisite of the six-year statute of limitation period on civil actions against the United States). See 1 COGGINS, *supra* note 47, at § 9.03[2][a].

Section 7 a wider territorial application, how far can it go? Specifically, in the context of foreign development assistance projects like the Mahaweli project, should the ESA bind United States government officials who serve as executives of the World Bank or the regional development banks?

### III. APPLYING THE CURRENT ESA TO BILATERAL AND MULTILATERAL DEVELOPMENT ASSISTANCE

Plaintiff presented the substantive issue in *Defenders* largely as one of extraterritoriality: does ESA Section 7 apply to actions of "Federal agencies" taken in foreign countries? The type of action at issue in *Defenders* was USAID participation in economic development projects, particularly the Mahaweli project in Sri Lanka.

In looking beyond the *Defenders* case, a wider view of the issue should be taken. After all, economic development projects are usually joint efforts. Most of the financing for them comes not from USAID or from other individual countries, but instead from multilateral development banks. These banks are international organizations with some of the attributes of sovereign countries, but of course without territory. Therefore, whether ESA Section 7 applies to those banks is a more basic question than simple extraterritoriality. Instead, it is one of "superterritoriality." Both the district court and the court of appeals in the *Defenders* case declared, without discussion or citation of authority, that the World Bank is not a federal agency.<sup>80</sup> The reply brief filed on behalf of the Secretary of the Interior reiterated that point and provided authority for the proposition that the World Bank also is not an "instrumentality" of the United States.<sup>81</sup> Those conclusions, although correct, are too simplistic. They do not settle the question whether the ESA applies to United States participation in the multilateral development banks.<sup>82</sup>

Subsection A below considers the applicability of the ESA in its current formulation<sup>83</sup> to bilateral development assistance provided

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80. *Defenders of Wildlife v. Hodel*, 658 F. Supp. at 47 n.6; *Defenders of Wildlife v. Hodel*, 851 F.2d at 1041.

81. Petitioner's Reply Brief at 4 n.1, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424).

82. See *infra* notes 104-16 and accompanying text.

83. Reauthorization of the ESA has generated considerable political controversy because its domestic applications, particularly with respect to the Northern spotted owl, have had severe consequences on some economic interests. Most past amendments to

through USAID. Subsection B examines the possible superterritorial application of the ESA through United States participation in the multilateral development banks.

### A. *The ESA's Extraterritoriality and Bilateral Development Assistance*

The extraterritoriality issue — whether United States laws should be applied to persons or circumstances outside the territory of the United States — has arisen in several contexts, including securities law, export controls, competition law, and corrupt business practices.<sup>84</sup> The Supreme Court has developed a presumption against extraterritorial application, but the presumption is rebuttable with evidence of congressional intent to extend the legislative scope beyond the territorial jurisdiction of the United States.<sup>85</sup> The power of Congress to dictate standards to federal agencies operating abroad is clear; the question in *Defenders* was whether Congress intended to do so in the ESA.

ESA Section 7 reads in pertinent part:

Each Federal agency shall, in consultation with . . . the Secretary [of the Interior] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or any threatened species or result in the destruction or adverse modification of [the critical habitat of such a species].<sup>86</sup>

A literal reading of Section 7 supports plaintiffs' argument for extraterritorial application, because Congress did not limit or condition the

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the ESA, however, have been in the direction of enhanced environmental protection. *See, e.g., Coggins & Harris, supra* note 24, at 278 (amendments considerably strengthened the legal protection of vulnerable plant species).

84. *See, e.g., Securities Exchange Act of 1934*, 15 U.S.C. § 78j (1988); *The Export Administration Act of 1979*, 50 U.S.C. App. §§ 2401-2420 (1988); *The Sherman Act*, 15 U.S.C. §§ 1-2 (1988); *The Clayton Act*, 15 U.S.C. § 12 (1988); *The Federal Trade Commission Act*, 15 U.S.C. §§ 44, 45(a)(1) (1988); *The Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78dd, 78ff(a) (1988).

85. *See Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (congressional legislation does not apply outside territorial jurisdiction of the United States unless a contrary intent appears).

86. 16 U.S.C. § 1536(a)(2) (1988). Both the 1978 and the 1986 regulations use similar language. In the 1978 regulations, the pertinent wording was "activities or programs." 43 Fed. Reg. 874 (1978). In the 1986 regulations, the language in the corresponding passage was changed to "action it authorizes, funds, or carries out." A separate passage defined "action" as "activities and programs of any kind . . ." 51 Fed. Reg. 19,926 (1986) (codified at 50 C.F.R. § 402.01(a) (1991)).

application of Section 7 in any way, geographically or otherwise. The Court in *TVA v. Hill*,<sup>87</sup> construing essentially the same wording, held that a literal interpretation is appropriate, regardless of “common sense,” if the congressional will to reject qualifications is clear.<sup>88</sup> Congress provided express limitations to the applicability of other ESA sections,<sup>89</sup> bolstering the inference that if Congress had wished to confine Section 7 to domestic application, it would have expressly said so.

One reading of the statute as a whole also supports extraterritorial application. In a myriad of references, Congress made it abundantly clear that it was concerned with all species of wildlife worldwide, and not just in the United States. The Act’s purposes include carrying out wildlife protection treaties.<sup>90</sup> Indeed, one entire section refers solely to the implementation of two major wildlife preservation treaties.<sup>91</sup> Several sections focus on foreign commerce,<sup>92</sup> and others clearly contemplate the listing of species on foreign soil.<sup>93</sup> The statute also draws distinctions between domestic and foreign applications in other contexts.<sup>94</sup> Finally, Section 7 itself expressly mandates cooperation with other countries.<sup>95</sup>

These arguments supporting extraterritorial application of Section 7 are persuasive, especially in light of Chief Justice Burger’s admonition against judicial rewriting after Congress has spoken.<sup>96</sup> Nevertheless, the government’s position (opposing extraterritorial application) is likely to prevail upon further litigation of the question, especially if that litigation arises in the context of USAID bilateral financial assistance.

First, Section 7 is ambiguous: although it does not rule out extraterritorial application, neither does it expressly require it. The legislative history is devoid of good evidence either way. Considered in light of the presumption against extraterritoriality, that alone might be dispositive, as Justice Stevens seemed to assume. One may reasonably expect

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87. 437 U.S. 153 (1978).

88. *Id.* at 180.

89. *E.g.*, 16 U.S.C. §§ 1538(b), 1539 (1988).

90. *Id.* § 1531(b).

91. *Id.* § 1537a.

92. *Id.* §§ 1533(b)(1)(A), (B), 1538.

93. *Id.* § 1533(b).

94. *Id.* § 1538(a).

95. *Id.* § 1537.

96. *TVA v. Hill*, 437 U.S. 153, 194 (1978).

that Congress would at least discuss an expansion of jurisdiction of that magnitude. Further, the "critical habitat" language in Section 7 almost certainly applies only domestically.<sup>97</sup> Nowhere in the legislative history did Congress evince an intent to "sever" any part of Section 7 from another part for geographic or other purposes.<sup>98</sup>

Second, Congress expressly dealt with foreign concerns in several sections,<sup>99</sup> suggesting that extraterritorial application was not intended for other provisions, or for the Act as a whole. For example, the provisions of Section 8 on "international cooperation"<sup>100</sup> do nothing to support an expansive interpretation of Section 7, because Section 8 defines the areas, subjects, and methods of cooperation.<sup>101</sup>

Third, making Section 7 applicable on foreign soil raises certain political and practical problems that Congress should have at least mentioned had it actually intended extraterritorial application. Many of these problems arise in the case of USAID operations. In fact, the language of Section 7 makes little sense in the context of a USAID-supported project overseas.

All three of the operative verbs in Section 7 — "authorize[ ]," "fund[ ]," and "carr[y] out"<sup>102</sup> — could apply in the case of a USAID-supported project, but very different meanings attach to each. First, USAID must authorize support for a project. That authorization constitutes an "agency action," but that "action" arguably takes place in the United States. If so, no issues of extraterritoriality would be raised at all. Second, once a project has been so "authorized," it then will be "funded," at least in part, by USAID — an action that might or might not be viewed as taking place in the United States.<sup>103</sup> Finally, the project itself will be "carried out" in the foreign country. In many cases, however, a project supported by USAID is not in fact carried out by USAID but instead by the foreign government or independent contractors hired by that government.

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97. See *supra* note 50 and accompanying text.

98. *Defenders*, 112 S. Ct. at 2150 (Stevens, J., concurring).

99. See *supra* notes 90-95 and accompanying text.

100. 16 U.S.C. § 1537 (1988).

101. *Id.*

102. See *supra* note 86 and accompanying text giving the pertinent language of Section 7.

103. "Funding" might take place, for example, either when the project is authorized and an account established on USAID's records or when funds are forwarded to the recipient government or to suppliers of goods and services.



As applied in the case of USAID operations, then, the “authorized, funded, or carried out” language seems ill-suited as a definition of “action” of a federal agency. This suggests that Justice Stevens was correct in his concurring opinion in *Defenders*: Congress almost surely did not consider whether the ESA should apply to USAID’s development assistance operations. Further, the legislative history of the ESA gives no indication that Congress thought about the applicability of Section 7 in the context of bilateral development assistance. This is an expansion of such magnitude that Congress reasonably could have been expected to discuss it.

The reasonable conclusion emerging from this review of the text, the context, the legislative history, and other sources of guidance as to the meaning of Section 7 is that that provision was not designed to apply to USAID participation in economic development projects. Even though a credible post-hoc argument might be made for applying the language of Section 7 to such participation, that kind of extraterritorial application was not envisioned by Congress and cannot easily be squared with the provisions of the statute.

### B. *Superterritoriality and Multilateral Development Assistance*

USAID is the primary institution through which the United States government provides non-military foreign assistance. USAID provides about \$2 billion in loans and grants each year for development projects in economically less developed countries (LDCs), such as the Mahaweli project in Sri Lanka.<sup>104</sup> These sums of money pale in contrast to the overall levels of assistance provided by the World Bank and other multilateral development banks, which include the Asian Development Bank, the Inter-American Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. Those institutions lend over \$30 billion each year for development assistance, more than fifteen times as much as USAID.<sup>105</sup>

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104. See AGENCY FOR INTERNATIONAL DEVELOPMENT, CONGRESSIONAL PRESENTATION FISCAL YEAR 1993, PART II 8-9 (1992) [hereinafter USAID 1993 PRESENTATION]. USAID also provides another \$3 billion annually in the form of non-project economic support funds. See *id.*

105. OFFICE OF PLANNING AND BUDGETING IN THE BUREAU FOR PROGRAM AND POLICY COORDINATION OF THE AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. OVERSEAS LOANS AND GRANTS AND ASSISTANCE FROM INTERNATIONAL ORGANIZATIONS — OBLIGATIONS AND LOAN AUTHORIZATIONS JULY 1, 1945 - SEPTEMBER 30, 1990 195 (1990). For example, World Bank loan commitments in fiscal year 1991 totaled \$22.7 billion, compared with total 1991 USAID loan and grant commitments of

The multilateral development banks differ from USAID not only in the size of their operations but also in their legal and financial characters. These institutions are intergovernmental organizations outside the control of any country's legal system. The World Bank, for example, was established at the close of World War II by forty-five countries and now has over 160 countries as members.<sup>106</sup> It gets its funds partly from contributions by member governments and partly by borrowing in international capital markets. It lends to LDCs at various interest rates, mainly for development projects.<sup>107</sup> Typically, these projects are identified by the LDC's government, appraised by the World Bank, and carried out through consulting and supply contracts financed by the World Bank, often in conjunction with other foreign lenders.

The United States is the World Bank's largest participant, holding about seventeen percent of the World Bank's total capital and about the same percentage of total voting power.<sup>108</sup> The composition of the World Bank's management and staff reflects the importance of the United States role in the institution. The President of the World Bank has always been an American, and many staff positions are held by Americans. Those officials, however, are not United States government employees. Rather, they are members of the international civil service. The legal nexus between the United States government and the World Bank is the Office of the U.S. Executive Director, an ambassador-level post filled by presidential appointment with the assistance of the U.S. Department of the Treasury. The U.S. Executive Director is one of twenty-two members of the World Bank's executive board.

Considering the enormous significance of the multilateral develop-

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\$2.7 billion. THE WORLD BANK, 1991 ANNUAL REPORT 13 (1991) [hereinafter 1991 WORLD BANK ANNUAL REPORT]; USAID 1993 PRESENTATION, *supra* note 104, at 9.

106. THE WORLD BANK, 1992 ANNUAL REPORT 4 (1992).

107. The World Bank Group consists technically of several entities. The two largest ones are the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The IBRD, established in 1945, obtains most of its working funds from borrowings, on the basis of securities which are themselves backed by the capital held by member countries. It lends those funds at near-market rates. The IDA, in contrast, obtains most of its working funds from contributions by the richer member countries, including the United States. The IDA makes "soft loans," which are for longer terms and require no periodic interest payments. John W. Head, *Environmental Conditionality in the Operations of International Development Finance Institutions*, 1 KAN. J. L. & PUB. POL'Y 15, 15-16 (1991).

108. 1991 WORLD BANK ANNUAL REPORT, *supra* note 105, at 200, 213. Voting power does not precisely mirror subscriptions, and the U.S. share in the IBRD is slightly different from its share in the IDA. *Id.*

ment banks in the financing of economic development projects in LDCs, no consideration of the proper application of the ESA to development assistance projects can be complete without a consideration also of its applicability to these institutions — that is, its superterritorial application. Can a case be made that Section 7 of the ESA applies to United States involvement in the multilateral development banks' financing of economic development projects?

Throughout the *Defenders* litigation, the lower courts brushed off that question by denying that the World Bank is a federal agency.<sup>109</sup> This is the right answer to the wrong question. As noted above, the operative verbs in Section 7 relating to agency "action" are susceptible of several meanings (all of them probably unintended) when read in the context of USAID participation in economic development projects.<sup>110</sup> Similarly, the language of Section 7 may be interpreted in various ways when read in the context of American involvement with the multilateral development banks. Under some of these interpretations, the ESA would have superterritorial application. In short, the fact that the World Bank is not a "Federal agency" or instrumentality does not preclude an imaginative interpretation by which the United States government could, if it wanted to, apply Section 7 to United States participation in the multilateral development banks.

There are several ways to reach this conclusion. The two key elements required to trigger the application of Section 7 are that there be a "Federal agency," which includes federal "instrumentalities," and an "action authorized, funded, or carried out by such agency."<sup>111</sup> The Treasury Department, a federal agency, "authorizes" World Bank financing for an economic development project by instructing the U.S. Executive Director to vote in favor of the World Bank loan. The 1986 regulations define "action" as encompassing "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies."<sup>112</sup> Although the U.S. Executive Director is not solely responsible for "authorizing" a World Bank loan, he or she carries out a part of the process. This reading of the statute is expansive, but it is not precluded by the statutory language.

An alternative application of Section 7 to U.S. participation in the

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109. See *supra* note 80 and accompanying text.

110. See *supra* notes 102-103 and accompanying text.

111. 16 U.S.C. §§ 1536(a)(2), 1532(7) (1988).

112. 51 Fed. Reg. 19,926 (1986) (emphasis added) (codified at 50 C.F.R. § 402.02 (1991)).

multilateral development banks would focus on the fact that loans made by the World Bank through the "soft loan" window<sup>113</sup> are "funded" in part by U.S. contributions to the World Bank, and not by World Bank borrowings. Hence, another possible, though strained, reading of Section 7 would have the Treasury Department as the "Federal agency," as in the first example, and would have the World Bank-financed project as the relevant "action," also as in the first example. The nexus between those two elements in this case, however, would be the "funding," rather than the "authorizing," of the loan. In short, the Treasury Department has funded, in part, every project financed by a World Bank "soft loan."

Under either of these two interpretations, Section 7 of the ESA would be triggered, and the Treasury Department would be required to consult with the Secretary of the Interior in order to insure that the World Bank-supported project is not likely to jeopardize the continued existence of any endangered species, threatened species, or critical habitat. The consultation would have to occur before that project was authorized (in part) or funded (in part) by the Treasury Department.

Under these interpretations — both of them strained but both of them possible — Section 7 would have superterritorial application.<sup>114</sup> Was this intended? Almost surely not. As explained above, Congress intended the ESA to have a broad reach, with international effects in some respects.<sup>115</sup> It seems clear, however, that Congress did not intend for the Section 7 requirements to be triggered by U.S. participation in the multilateral development banks. Had Congress so intended,

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113. See *supra* note 107 for a description of the "soft loan" operations of the International Development Association.

114. There are two other imaginative interpretations by which U.S. participation in the multilateral development banks might be considered to trigger Section 7. In both cases the relevant "Federal agency" would be the Treasury Department, but the relevant "action" would not be the World Bank-financed project. Under the first of these interpretations, the relevant "action" would be the act of the U.S. Executive Director casting a vote favoring such financing. The nexus between the "agency" and the "action" in this case would be the Treasury Department's "authorization" of that vote. Under the second interpretation, the "action" would be the transfer of IDA-destined funds from the U.S. Treasury to the World Bank. Here, the nexus would be both (i) the Treasury Department's "authorization" of the transfer of funds and (ii) its "carrying out" of that transfer of funds. In both of these cases, unlike those described in the preceding text, the relevant action (voting or transfer of funds) would be taken in the United States. These would therefore not be examples of the ESA being given superterritorial application. The result would, however, be the same: Section 7 of the ESA would be triggered.

115. See *supra* notes 43-46, 90-95 and accompanying text.

it could have and should have designed provisions that did not require such strained interpretation.<sup>116</sup>

#### IV. CHANGING THE ESA — SOME POSSIBILITIES AND THEIR LIMITATIONS

Two conclusions emerge from the foregoing discussion. First, when considering the extraterritorial application of Section 7 in the context of economic development assistance, its superterritorial application should also be considered. Second, Section 7 in its current form is ill-suited for either extraterritorial application or superterritorial application in the context of U.S. involvement in economic development assistance.

Turning to the future, if Congress wants to extend the ambit of the ESA, how far could it go? Specifically, would concerns over sovereignty of foreign states disallow extraterritorial application, as the government lawyers suggested in *Defenders*? Would concerns over the special status of the multilateral development banks militate against superterritorial application?

There is no legal barrier to such extensions. Congress has already applied many forms of conditionality to USAID operations and other foreign assistance programs. Bilateral development assistance has been made conditional on the recipient country's adoption of policies acceptable to the United States on such subjects as abortion,<sup>117</sup> human rights,<sup>118</sup> and freedom of the press.<sup>119</sup> Similar conditionality applies in

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116. Indeed, if Section 7 were interpreted as covering U.S. participation in the multilateral development banks, there would be no obvious logical reason not to interpret it as also covering other instances of U.S. participation in multilateral activities partially authorized, funded, or carried out by the United States. Should the Department of Defense have consulted with the Department of the Interior on matters relating to endangered species before undertaking Operation Desert Storm in 1991?

117. 22 U.S.C. § 2151b(f)(3) (1990) (prohibition on use of funds for researching abortions as a means of family planning). *See also* Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59, 65 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2257 (1991) (upholding USAID's policy of making family planning grants to foreign nongovernmental organizations conditional on the organizations' certifying that they did not perform or promote abortion as method of family planning).

118. 22 U.S.C. § 2151n(a) (1990) (prohibiting financial assistance to countries engaging in patterns of gross violations of human rights). *See also* 22 U.S.C. § 2426(b) (1988) (conditioning economic development assistance on absence of discrimination against U.S. employees on the basis of race, religion, national origin, or sex).

119. Foreign Assistance Act of 1973, Pub. L. 93-189, § 29, 87 Stat. 714 (1973) (*repealed by* Foreign Assistance Act of 1974, Pub. L. 93-559, § 29(b), 88 Stat. 1795 (1974))

other contexts as well. For example, an LDC is ineligible for a preferential tariff treatment if its government fails to (1) recognize and uphold internationally accepted human rights, (2) enforce arbitral awards, or (3) cooperate in prevention of drug trafficking and terrorism.<sup>120</sup>

If conditionality in the provision of economic development assistance has not been seen as a violation of sovereignty in these other contexts, why would it appear so in the context of wildlife preservation? The claims of foreign state sovereignty raised by the government lawyers seem ill-founded on this point. Making the provision of bilateral development assistance conditional on the protection of wildlife cannot reasonably be said to impose "statutory restrictions on the activities of foreign governments," as the government lawyers claimed.<sup>121</sup> Moreover, the contention that such wildlife-protection conditionality might offend the sensibilities of foreign governments hardly reflects any legal bar to the use of such conditionality.<sup>122</sup>

Some observers have turned the government lawyers' foreign-state-sovereignty objection on its head. Instead of finding that wildlife-protection conditionality would constitute an invasion of state sovereignty, they argue that the United States has an obligation under international law to ensure that actions of federal agencies do not cause any environmental injury, including injury to a species or its habitat. One of the

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(access of U.S. media correspondents to foreign military bases supported by the United States).

120. 19 U.S.C. § 2462 (b)(5)-(7) (1988).

121. Petitioner's Reply Brief at 16. *See also* Amici Curiae Brief of American Association of Zoological Parks & Aquariums and Friends of the Earth in Support of Respondents at 16-26, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424) [hereinafter *Zoo Brief*] (addressing conditionality of U.S. assistance to foreign countries). In a related point, the government lawyers claimed that the conduct of U.S. persons or agents in gathering data for the assessment required under the ESA could constitute an invasion of sovereignty if not consented to by the foreign state's government. Petitioner's Brief at 35-43, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424). While the statement is true, the argument is unpersuasive. If the foreign government objects to the gathering of data, USAID's refusal to support the project (for failure of the conditionality to be fulfilled) would still not constitute an invasion of sovereignty. As a practical matter, environmental assessments for projects financed by multilateral development banks are primarily the responsibility of the governments seeking the financing. In order to facilitate such assessments, technical assistance grants are often made available. *See, e.g., THE WORLD BANK, 1990 ANNUAL REPORT* 39, 65 n.22 (discussing Technical Assistance Grant Program for the Environment).

122. The government lawyers' claim on this point is deftly refuted by one of the amicus briefs in *Defenders*. *See Zoo Brief, supra* note 121, at 8-9.

amicus briefs in *Defenders*, for example, cited the 1972 Stockholm Declaration in support of the proposition that every country is responsible for insuring that activities within its jurisdiction or control do not cause damage to the environment of other states.<sup>123</sup> Similarly, the Restatement on United States Foreign Relations Law recognizes an obligation to act “so as not to cause significant injury to the environment of another state . . . .”<sup>124</sup>

Accordingly, Congress is not legally barred from giving Section 7 extraterritorial application in the context of United States support for economic development assistance projects. Although the precise formulation of Section 7 (including the “authorized, funded, or carried out” language and the “insure” notion) would require modification to make it applicable to USAID-financed projects, the wildlife-protection conditionality that the extraterritorial application of Section 7 would constitute could not reasonably be attacked on grounds that it would violate foreign state sovereignty.

Some of the same reasoning applies to the prospect of giving Section 7 superterritorial application. Just as conditionality is a familiar aspect of U.S. bilateral development assistance, it likewise appears often in U.S. participation in the multilateral development banks.<sup>125</sup>

Specifically, Congress has repeatedly imposed conditions on the exercise of the “voice and vote” of the U.S. in the multilateral development banks and on U.S. financial support for them.<sup>126</sup> The “voice and

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123. *Report of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF. 48/14 (1972), reprinted in 11 I.L.M. 1416, 1420 (1972) (cited in Amicus Curiae Brief of Ecotropica Foundation of Brazil, Slovak Union of Nature and Landscape Protectors, Fundacion de Parques Nacionales of Costa Rica, and Greenpeace International in Support of Respondents, at 10, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424) [hereinafter *Greenpeace Brief*]).

124. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 601(1)(b) (1987). According to the amicus brief filed on behalf of Greenpeace, “[t]he extraterritorial application of . . . the Endangered Species Act . . . fulfills the obligation” reflected in that provision. *Greenpeace Brief*, *supra* note 123, at 9. See also Marsha L. Anastasia, Note, *The Endangered Species Act and State Sovereignty: Defenders of Wildlife v. Lujan*, 7 CONN. J. INT’L L. 87, 119-22 (1991) (examining standards for imposing liability on countries that cause environmental injury).

125. Conditionality is also a common ingredient to the financing provided by the multilateral development banks to borrowing member countries. See, e.g., Head, *supra* note 107, at 15-26.

126. See Jonathan Earl Sanford, *U.S. Policy Toward the Multilateral Development Banks: The Role of Congress*, 22 GEO. WASH. J. INT’L L. & ECON. 1, 19-25 (1988) for a comprehensive survey of both the “voice and vote” conditionality and the “power of the purse” conditionality.

vote" conditionality usually takes the form of prohibiting the U.S. Executive Director at each such bank from voting in favor of proposed loans having particular characteristics. Congress has used this type of conditionality to express its views on a range of topics, including human rights,<sup>127</sup> democratic government,<sup>128</sup> expropriation,<sup>129</sup> and drug trafficking.<sup>130</sup>

Congress has also imposed "voice and vote" conditionality in the area of environmental protection. Legislation enacted in 1989<sup>131</sup> requires that the U.S. Executive Director at each of the multilateral development banks withhold support for any project that has not been subjected to an environmental assessment.<sup>132</sup> This is the most blatant form of environmental conditionality imposed by Congress thus far on

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127. 22 U.S.C. § 262d(a) (1988) (instructing the U.S. government to oppose loans to countries whose governments engage in "a pattern of gross violations of internationally recognized human rights" or provide "refuge to individuals committing acts of international terrorism by hijacking aircraft").

128. A 1989 act required the Secretary of the Treasury to instruct the U.S. Executive Directors of the multilateral development banks to vote against any loan to Panama unless the President certifies that Panama has made substantial progress toward establishing a democratic civilian government. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, § 564, 102 Stat. 2268, 2268-40 (1988), *cited in* Sanford, *supra* note 126, at 102.

129. 22 U.S.C. § 283r (1988) (calling for U.S. Executive Directors to vote against loans to countries that have expropriated investments owned by U.S. citizens unless arrangements are made for prompt, adequate, and effective compensation), *cited in* Sanford, *supra* note 126, at 102.

130. International Narcotics Control Act of 1988, 22 U.S.C. § 2291(h)(1)(B) (1988) (calling for U.S. Executive Directors to vote against loans to any country that is a major producer or transit site for illicit drugs), *cited in* Sanford, *supra* note 126, at 103.

131. International Development and Finance Act of 1989, 103 Stat. 2492 (codified as amended in scattered sections of 12 U.S.C. and 22 U.S.C.).

132. The Act specifically provides:

The Secretary of the Treasury shall instruct the United States Executive Director of each multilateral development bank not to vote in favor of any action proposed to be taken by the respective bank which would have a significant effect on the human environment, unless for at least 120 days before the date of the vote . . . an assessment analyzing the environmental impacts of the proposed action has been completed by the borrowing country or the institution, and been made available to the board of directors of the institution.

*Id.* at § 521(a) (codified as amended at 22 U.S.C.A. § 262m-7(a)). In June 1992, the Treasury Department announced procedures enabling the public to review the environmental assessments supplied by the multilateral development banks. Environmental Review of Actions by Multilateral Development Banks (MDBs), 57 Fed. Reg. 24,545 (1992) (to be codified at 31 C.F.R. pt. 26) (proposed June 10, 1992).



U.S. participation in the multilateral development banks.<sup>133</sup>

Congress could easily do the same for wildlife protection. That is, if it wants to give superterritorial effect to Section 7 of the ESA in order to press the multilateral development banks to strengthen their commitment to protecting wildlife,<sup>134</sup> Congress can impose conditions to this effect on the Secretary of the Treasury's discretion in instructing the U.S. Executive Directors at the multilateral development banks to vote for or against particular loan proposals. Congress cannot, of course, directly dictate policies to the banks themselves, but imposing such wildlife-protection conditionality on U.S. participation in the banks probably would prove influential.

Legislation giving the ESA superterritorial application could take several forms. For example, if Congress' commitment to wildlife conservation runs so deep as to reject *any* American involvement in a project posing *any* threat to an endangered or threatened species, then Congress could require that the U.S. Executive Director not support a loan for such a project. This would be "voice and vote" conditionality. Alternatively, if Congress were to judge that a particular multilateral development bank had not shown a strong enough sensitivity to wildlife conservation generally, Congress could order a withdrawal of all United States support and funding for that bank. This would constitute "power of the purse" conditionality.

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133. Congress has, however, directed that the U.S. "voice and vote" be used to influence these institutions' environmental policies in other ways. For example, Congress has directed the Secretary of the Treasury to instruct the U.S. Executive Directors at the multilateral development banks "to support the strengthening of education programs within each multilateral development bank to improve the capacity of mid-level managers to initiate and manage environmental aspects of development activities, and to train officials in borrowing countries in the conduct of environmental analyses." 22 U.S.C. § 262m-4 (1990). See also 22 U.S.C.A. § 262l(a) (1992) (calling for U.S. Executive Directors to "promote vigorously . . . the expansion of programs in areas which address the problem of global climate change").

134. The environmental assessment procedures of the World Bank and the Asian Development Bank already expressly provide for issues of wildlife protection to be taken into account. See, e.g., THE WORLD BANK, WORLD BANK TECHNICAL PAPER NUMBER 139, ENVIRONMENTAL ASSESSMENT SOURCEBOOK, VOL. I, POLICIES, PROCEDURES, AND CROSS SECTORAL ISSUES 35 (1991) (reprinting World Bank Operational Directive 4.00, stating that environmental assessments should address biological diversity, including conservation of endangered plants and animals). Loan documents for projects financed by these institutions often include covenants aimed at wildlife protection. For example, in one Sri Lankan project (not the Mahaweli project), the loan agreement between the Asian Development Bank and Sri Lanka called for protection of the existing elephant population. (Relevant documents on file with authors.)

In drafting legislation to give superterritorial application to Section 7, Congress would need to recognize that some types of conditionality might be less effective than others. A study of the effectiveness of congressional attempts to influence multilateral development bank operations concluded that "voice and vote" conditionality has generally proven more effective than "power of the purse" conditionality — that is, requirements or threats to cut United States financial support for multilateral development banks.<sup>135</sup> That study also identified certain limits to the influence Congress can exercise over those banks<sup>136</sup> and cautioned against the indiscriminate imposition of conditionality.<sup>137</sup>

In sum, giving superterritorial application to Section 7 of the ESA would be a delicate matter. Because of the indirect link between the United States and the individual development projects that the multilateral development banks finance, the mechanism for expressing U.S. commitment to wildlife conservation would require careful formulation in order to make it effective.<sup>138</sup> After all, the policy of Congress as declared in the ESA is "that all Federal departments and agencies shall seek to conserve" wildlife at risk.<sup>139</sup> Congress will need to make a careful calculation of what sort of superterritorial approach, if any, will best serve that policy.

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135. Sanford, *supra* note 126, at 67-77.

136. *Id.* at 77-85. According to Sanford, Congress can influence multilateral development bank operations in the following way: First, Congress must persuade the Administration to advocate a particular requirement. Second, the Administration must persuade other major member countries of the multilateral development bank to support the initiative. Third, the United States and its allies must vote to require the bank's management to champion the new initiative. Finally, the bank must persuade borrowing countries to incorporate the initiative into new loans. *Id.* at 79.

137. Sanford advised that:

[f]or maximum effect, confrontational tactics [for example, cutting financial support to the multilateral development bank] should probably be reserved for the most serious and far-reaching issues . . . . For issues of secondary importance, or cases where other member countries are unlikely to relent, less dramatic legislative tools [for example, requiring Executive Directors to focus their efforts on persuasion through their "voice and vote"] may be more effective devices for realizing U.S. goals.

*Id.* at 91.

138. This is a question of "loss of leverage." If the United States expresses its commitment to wildlife conservation by avoiding involvement with any project posing any risk to wildlife, then the United States will probably lose the opportunity to influence project preparation in such a way as to reduce that risk. See Petitioner's Brief at 45, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424).

139. 16 U.S.C. § 1531(c)(1) (1988).

## V. CONCLUDING OBSERVATIONS

One of the most significant issues presented by the *Defenders* case was not squarely addressed by any of the courts involved: how should U.S. commitment to wildlife conservation be expressed in the context of economic development assistance in other countries, such as the Mahaweli project in Sri Lanka?

A look beyond the Supreme Court's *Defenders* decision reveals a need to scrutinize carefully whether and how Section 7 of the ESA should be given either extraterritorial application or superterritorial application. Much is legally possible in this regard, but what is wise? Congress has plenty of scope for imposing wildlife-protection conditionality both on USAID operations and on U.S. participation in the multilateral development banks. Most development assistance projects that USAID supports in foreign countries (including the Mahaweli project), however, are multilateral in character. USAID is only one participant of many. A simplistic extension of Section 7 requirements to consult and to insure against risk to wildlife may be inappropriate in that context. Likewise, the character of this country's role in the multilateral development banks demands that efforts to influence those institutions in the area of wildlife conservation be undertaken with an eye to effectiveness, not emotion alone.